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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

SON LORN et al.,

Defendants and Appellants.

B211680

(Los Angeles County
Super. Ct. No. BA313197)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Stephen A. Marcus, Judge. Affirmed as modified.

Linda Acaldo, under appointment by the Court of Appeal, for Defendant
and Appellant Jimie Tran.

Lynette Gladd Moore, under appointment by the Court of Appeal, for
Defendant and Appellant Son Lorn.

Edmund G. Brown, Jr., Attorney General, Dane Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Robert L.
Davis and Marc A. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Appellants Son Lorn and Jimie Tran appeal their convictions and sentences for attempted murder, shooting at an occupied vehicle, and weapons and gang enhancements. Before this court Lorn asserts that there was insufficient evidence to support his attempted murder convictions under a theory that he aided and abetted Tran in the shooting. Lorn argues that the prosecutor failed to present evidence that he shared Tran's murderous intent. Appellant Tran argues his convictions must be reversed because: (1) the jury was improperly exposed to bad character evidence in the form of testimony concerning uncharged offenses that he allegedly committed; (2) there was insufficient evidence that the crimes were committed with the specific intent to promote or assist a criminal street gang; and (3) the effect of cumulative trial errors denied him a fair trial. Finally both appellants claim the court erred in failing to grant them presentence conduct credits. Only the sentencing contention has merit. As to Lorn's contention, we conclude there was sufficient evidence of Lorn's actions before, during and after the shooting to support his conviction as an aider and abettor. Likewise, Tran's claims also fail—he did not object to the character evidence in the trial court and has not shown his counsel was ineffective for failing to object. There was also ample evidence that the shooting was gang motivated. Accordingly, we affirm and order a modification of appellants' sentences.

FACTUAL AND PROCEDURAL HISTORY

Individuals Involved In The Crimes And Their Prior Interactions.

Appellants were both members of the Oriental Lazy Boy (“OLB”) criminal street gang. OLB has about 100 members and its primary gang area includes Chinatown in downtown Los Angeles; the gang was known to frequent the Alpine Park area in Chinatown. Appellant Lorn was known by the gang moniker “Silent” and appellant Tran was known as “Little Snoopy” or “Little Snoop.”

Khoun Lim and Thanh Nguyen were members of a graffiti “tagging crew” known as “NERD.” NERD graffiti was found in the Chinatown OLB territory. In at least one location, NERD graffiti had been crossed out and “OLB” had been written nearby.

In November 2005, Lim and Nguyen and a friend, Borankmey Loeung encountered Lorn and another OLB member named Vutha Kong in Chinatown. A fist fight ensued during the encounter. Lim, Nguyen and their friend Loeung fled when Kong brandished a knife.

A few days later, Kong stabbed Loeung, killing him. Kong was arrested and charged with the murder. In March 2006, both Lim and Nguyen testified against Kong during the preliminary hearing in Kong's case. About a month later, Nguyen and Lim encountered Lorn again. Lorn slashed the tires on Lim's car and told them "I'm going to get you."¹ At some point during one of these encounters, Lorn had identified himself to Lim and Nguyen as a member of OLB.

In September 2006, Nguyen and Lim encountered Tran and a few others near Alpine Park. Tran identified himself as a member of OLB and asked where Nguyen and Lim were from. A fist fight resulted during this interaction.

Crimes at Issue in this appeal.

On the evening of November 22, 2006, Lim and Nguyen were driving in Lim's car near Alpine Park when they saw Lorn and Tran standing on a sidewalk nearby. Lorn yelled out, "Fuck NERD," as Lorn and Tran ran towards Lim's car. Lorn carried a switchblade. Lim got out of the car and tried to disarm Lorn by kicking or punching him. Lim feared that Lorn would slash his tires and was going to stab him. Nguyen told police and testified at the preliminary hearing that he heard Lorn say "Get them, get them."² Nguyen and Lim realized that Tran had a gun as Lim jumped back into the car. Tran fired the gun a number of times at Lim and Nguyen and struck them both. Lorn and Tran

¹ Lim and Nguyen reported the incident to the police . Lorn was arrested and pled guilty to charges stemming from it.

² During cross examination at the trial, Nguyen testified that he did not know who said "Get them, get them." He also stated, however, that he was afraid to testify during the trial.

fled together. Lim drove out of the area to a friend's house; the friend drove Lim and Nguyen to the hospital.

A few days later, Lim and Nguyen identified Lorn and Tran as their assailants from a photo array.

Arrest and Trial.

Lorn and Tran were arrested in late November 2006. Police found gang paraphernalia in their homes. In Tran's bedroom they found a letter dating from October 2006, from Tran to Kong in which Tran lamented Kong's conviction and deportation and further expressed anger over the "snitch" responsible for Kong's conviction.

Tran and Lorn were each charged with two counts of attempted murder and shooting at an occupied vehicle. It was further alleged that Lorn personally used a deadly weapon and that Tran intentionally discharged a firearm causing great bodily injury. As to both Tran and Lorn, it was further alleged that the crimes were committed for the benefit of a street gang under Penal Code section 186.22.

During the trial, in addition to the testimony of Nguyen and Lim, the prosecution also presented testimony from a gang expert familiar with the OLB. The expert testified that OLB's rivals included other Asian gangs, and that their primary activities included murders, robberies and witness intimidation. The expert explained that gang members commit crimes to increase their individual status in the gang, to intimidate members of other gangs and to create fear in the community, which would serve to increase the power of the gang to commit other crimes with impunity. The expert further testified that gang members commit crimes against witnesses (i.e., snitches) who testify against fellow gang members and that such retaliation serves to benefit the gang. In addition, the expert noted that gangs often cross-out the graffiti of another rival group to demonstrate dominance or claim territory. The expert opined that if a person leaves a gang, typically he would no longer associate with the gang's members.

The expert was presented with a hypothetical based on the facts of this case and offered the opinion that the shooting was committed for the benefit of the OLB gang. The expert based his opinion on the pattern of prior incidents beginning with the first

confrontation between the victims and OLB members; he stated that each confrontation thereafter was an escalation of the first one. The expert observed that in the final confrontation the act of calling out to the rival group was the way for OLB to disrespect the NERD tagging crew.

Following the trial the jury found Tran and Lorn guilty of the charges and found the special allegations to be true.

Appellants timely filed notices of appeal.

DISCUSSION

Before this court appellant Lorn asserts that there was insufficient evidence to support his attempted murder convictions. Appellant Tran argues his convictions must be reversed because: (1) the jury was improperly exposed to bad character evidence in the form of testimony concerning prior uncharged offenses; (2) there was insufficient evidence that the offenses were committed with the specific intent to promote or assist a criminal street gang; and (3) the effect of cumulative trial errors denied him a fair trial. Finally, both appellants claim the court erred in failing to grant them presentence conduct credits. We address the contentions in turn.

I. Sufficient Evidence Supports Lorn's Convictions for Attempted Murder.

In a criminal case, when sufficiency of the evidence is challenged on appeal our role in reviewing the evidence is limited. It is not our task to reweigh the evidence and substitute our judgment for that of the jury. (*People v. Escobar* (1996) 45 Cal.App.4th 477, 481.) Instead, we must look at the entire record to determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Jones* (1990) 51 Cal.3d 294, 314.) This court considers the evidence in the light most favorable to the prosecution and presumes the existence of every fact the trier could reasonably deduce from the evidence; we resolve all conflicts in the evidence, in support of the judgment. (*Ibid.*) "A reasonable inference may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. A finding of fact must be an inference drawn from evidence rather than a mere speculation as to probabilities without evidence." (*People v. Tran* (1996) 47 Cal.App.4th 759, 772,

citations omitted.) Nonetheless, this court may conclude that there is no substantial evidence in support of conviction only if it can be said that on the evidence presented no reasonable fact finder could find the defendant guilty on the theory presented. Thus, where the record discloses substantial evidence – that is reasonable, credible and of solid value – we accord due deference to the trier of fact. (*People v. Jones, supra*, 51 Cal.3d at p. 314.)

On appeal Lorn complains that the prosecution failed to present substantial evidence to support his convictions for attempted murder of Lim and Nguyen. Specifically Lorn points out that he was prosecuted based on the theory that he “aided and abetted” Tran in shooting the victims. He asserts, however, that there was no evidence that he participated in the shooting, encouraged or assisted in it or had knowledge of Tran’s actions or shared Tran’s intent. He claims the evidence proved only that he was present at the scene and attempted to puncture Lim’s tires with his switchblade. At most, Lorn asserts that the evidence presented might prove that he intended to commit a battery or property damage and nothing showed that he intended for the violence to escalate. We do not agree.

A defendant who “aids and abets” in the commission of the crime is a “principal” in the crime and shares the criminal liability of the actual perpetrator. (*People v. Prettyman* (1996) 14 Cal.4th 248, 259.) “[A]n aider and abettor is a person who, ‘acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime.’” (*Ibid.*) Neither presence at the scene of a crime nor knowledge of it is sufficient to establish aiding and abetting its commission. “However, ‘[a]mong the factors which may be considered in making the determination of aiding and abetting are: presence at the scene of the crime, companionship, and conduct before and after the offense.’” (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409, quoting *In re Lynette G.* (1976) 54 Cal.App.3d 1087, 1094.)

A conviction for attempted murder requires proof of the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the killing. (*People v. Stone* (2009) 46 Cal.4th 131, 136.) In the context of this case, the convictions for attempted murder required proof Lorn knew and shared the murderous intent of the actual perpetrator, Tran.³ (See *People v. McCoy* (2001) 25 Cal.4th 1111, 1118.)

Although no direct evidence showed Lorn acted with the required knowledge or purpose, there was sufficient evidence from which a rational trier of fact could reasonably infer that Lorn acted with the required mental state.

Here, reasonable, solid and credible evidence showed that the shooting on November 22, 2006, was the culmination of a series of violent interactions between Lorn, Tran, OLB gang members and the NERD tagging crew. There was substantial evidence that Lorn had fought these victims on several prior occasions, had slashed Lim's tires and had threatened them, telling Lim at one point: "I am going to get you." The prosecution also presented evidence that Lorn might seek revenge for the testimony Lim and Nguyen gave against Lorn's gang associate Kong. Furthermore, on November 22, just before Lorn and Tran ran towards Lim's vehicle, Lorn yelled out an explicative indicating a direct challenge to the NERD crew. Nguyen also testified that he thought Lorn was going to stab him when he jumped out of the car. Nguyen also told police that seconds before the shooting he heard Lorn shout: "Get them. Get them."⁴ Lorn and Tran also fled together after the shooting. This evidence proves more than just Lorn's presence at the crime scene and a desire to vandalize Lim's car. It is also evidence from which the jury could infer concerted action and shared intent to kill Lim and Nguyen. From this

³ The trial court declined to give an instruction on the natural and probable consequences doctrine of liability.

⁴ Although Nguyen did not identify Lorn as the source of the statement "Get them. Get them," at trial, he did attribute that statement to Lorn at the preliminary hearing and when he spoke to the police. It was the jury's duty to determine Nguyen's credibility as well as resolve any conflicts in the evidence. On appeal, we resolve any such conflicts in favor of the judgment.

evidence, the jury could have reasonably deduced that Lorn aided and abetted Tran in these crimes. Consequently, sufficient evidence supported Lorn's convictions for attempted murder.

II. Reference to Prior Uncharged Conduct

During the trial the court permitted the prosecution to present evidence of the prior confrontations between Tran and the victims, including evidence of the prior fights and other conduct—Lorn's threats and vandalism of Lim's car. The prosecution also presented evidence of Tran's prior conviction for "tagging."

During the examination of the gang expert, the prosecutor asked the expert to opine on whether Tran was a member of the OLB gang. The expert responded that Tran was an OLB member. When asked to explain the basis of this opinion, the expert responded:

"It's based on a number of factors. Not only speaking to the victims and witnesses in this as well as previous crimes, his previous arrest by the aforementioned officer, the evidence that was recovered from his possession as well as his residence, his association to other members of the Oriental Lazy Boys, as well as the location of the crimes that occurred in Alpine Park which is a known Oriental Lazy Boy's Hangout."

Before this court, Tran complains that the expert's reference to "previous crimes" amounted to inadmissible "bad character" evidence under Evidence Code section 1101 (a) because the jury could have interpreted the phrase to refer to uncharged robberies or murders Tran committed.

A. Forfeiture and Ineffective Counsel

The Attorney General asserts that Tran has forfeited any claims as to the expert's reference because he failed to object in the trial court. As a general matter, errors relating to the admission of evidence are not preserved for appellate review if no objection is made in the trial court. (Evid. Code, § 353; *People v. Partida* (2005) 37 Cal.4th 428,

433-434.) “The purpose of the rule requiring an objection is to give the trial court the opportunity to cure any error, if possible by an admonition to the jury.” (*People v. Melton* (1988) 44 Cal.3d 713, 735.)

Tran argues his counsel was ineffective for failing to assert an objection to this evidence. To establish a claim of ineffective assistance of counsel, the defendant must prove both counsel’s representation was objectively deficient, below a reasonable standard of care under prevailing professional norms, and prejudice flowing from the deficient performance, that is, but for counsel’s errors, the defendant would have received a more favorable result. (*People v. Waidla* (2000) 22 Cal.4th 690, 718.) Defendant has the burden of proving an ineffective assistance. (*People v. Ledesma* (1987) 43 Cal.3d 171, 218.)

Given the difficulties inherent in making this evaluation, this court indulges in a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; appellant must overcome the presumption that, under the circumstances, the challenged action “might be considered a sound trial strategy.” (*People v. Thomas* (1992) 2 Cal.4th 489, 530-531.) “Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.” (*Strickland v. Washington* (1984) 466 U.S. 668, 690-691.) In addition if the record sheds no light on why counsel acted or failed to act in the challenged manner, the court will reject the claim on appeal unless counsel was asked for an explanation and failed to provide one, or there could be no satisfactory explanation for counsel’s performance. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)

Moreover, a reviewing court need not determine “whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.” (*In re Fields* (1990) 51 Cal.3d 1063, 1079.) Defendant must affirmatively demonstrate prejudice. It is not sufficient for the defendant to show the error had some “conceivable effect” on the outcome of the proceeding; defendant must

prove that there is a “reasonable probability,” that absent the errors the result would have been different. (*People v. Ledesma, supra*, 43 Cal.3d at pp. 217-218.)

Here, as we explain below, appellant’s counsel was not ineffective for failing to object because appellant has failed to demonstrate that admission of the reference to “previous crimes” ran afoul of the prohibition against the admission of bad character evidence or resulted in prejudice.

B. The Merits.

Under Evidence Code section 1101, subdivision (a) evidence of a person’s character, including specific instances of his or her conduct is inadmissible when offered to prove his or her conduct on a specified occasion. This notwithstanding, admission of evidence a person committed a crime, civil wrong, or other act is admissible when it is relevant to prove some fact such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident (Evid. Code, § 1101, subd. (b)) or to overcome any material matter sought to be proved by the defense. (*People v. Alcala* (1984) 36 Cal.3d 604, 631.)

In our view, Tran has not shown that the expert’s brief mention of “previous crimes” implicated Evidence Code section 1101, subdivision (a). First, the reference was not offered to prove that Tran committed the murders or to otherwise prove his conduct on any particular occasion. Instead the expert’s testimony pertained to the issue of Tran’s membership in the OLB gang, and precisely to the expert’s view that Tran was an active OLB member. In this regard, this evidence was akin to that permitted under Evidence Code section 1101, subdivision (b), because it was offered to prove identity of the perpetrator as a gang member and indirectly to prove motive and intent—that the crime was committed to promote, further or assist in the gang’s criminal conduct as required by Penal Code section 186.22. In any event, we do not agree that a jury must have interpreted the evidence as Tran suggests—to refer to uncharged murders and robberies committed by Tran. Rather it is likely that a reasonable jury would have interpreted the reference to “previous crimes” to refer to Tran’s other criminal conduct properly admitted into evidence including his prior violent encounters with these victims. In view of the

foregoing, we conclude this evidence was relevant to prove a material issue of the case and would pass muster under Evidence Code section 1101. Thus, Tran's counsel was not incompetent in failing to object to it.

Nonetheless, even were we to conclude that the comment should have been excluded, we would conclude that based on this record Tran suffered no prejudice under any standard by which it is measured. The reference to "prior crimes" was brief and ambiguous. Moreover the evidence against Tran was overwhelming. The victims both identified Tran as the shooter. In addition, the evidence of his gang motive was demonstrated by the evidence of his gang involvement and his history of confrontations with these victims. Consequently, we cannot say admission of this evidence constituted a miscarriage of justice. (*People v. Cole* (1982) 31 Cal.3d 568, 581 [erroneous admission was harmless where evidence was strong and little mention was made of the prior conviction].)

III. Sufficient Evidence Supported the Jury's Findings on the Gang Enhancements.

Before this court, Tran argues there was insufficient evidence to support the jury's findings on the criminal street gang enhancement on all counts because there was no evidence to show that he intended to promote, further or assist in the gang's criminal conduct as required by Penal Code section 186.22, subdivision (b)(1). (See Pen. Code, § 186.22, subd. (b)(1).)

Relevant Legal Principles. A true finding on an allegation of a criminal street gang enhancement requires proof the crime at issue was committed "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members" (Pen. Code, § 186.22, subd. (b)(1).)

Our Supreme Court has repeatedly affirmed the use of expert testimony by law enforcement professionals who have experience in the area of gang culture and psychology to demonstrate a defendant's intent and the gang-related activities to support a finding under Penal Code section 186.22. (See, e.g., *People v. Gardeley* (1996) 14

Cal.4th 605, 617 (*Gardeley*) [expert testimony by police detective particularly appropriate in gang enhancement case to assist fact finder in understanding gang behavior]; *People v. Gonzalez* (2006) 38 Cal.4th 932, 944-946 [reaffirming *Gardeley* and admissibility of officer's expert testimony in the area of gang culture and psychology]; see also *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1207-1208 [affirming admission of officer's expert opinion that sole gunman who displayed no gang signs during shooting acted to bolster gang and his own reputation in gang]; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1384 ["It is difficult to imagine a clearer need for expert explication than that presented by a subculture in which this type of mindless retaliation promotes 'respect.'"].⁵

Thus, gang expert testimony may properly be admitted to prove motive and intent. (See *People v. Funes* (1994) 23 Cal.App.4th 1506, 1518.) Expert testimony has repeatedly been offered to prove the "motivation for a particular crime, generally retaliation or intimidation" and "whether and how a crime was committed to benefit or promote a gang." (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 657.) An expert may testify concerning the culture, habits and psychology of gangs because these matters

⁵ We note that the Supreme Court has granted review in a case from Division Six of this court to determine whether substantial evidence supports convictions under Penal Code section 186.22, subdivision (a) (active participation in criminal street gang), and true findings with respect to enhancements under Penal Code section 186.22, subdivision (b), based on a gang expert's testimony that three gang members who raped a young woman committed their crimes for the benefit of and in association with their gang. (*People v. Albillar*, review granted Aug. 13, 2008, S163905.) The Court's opinion may restrict the scope of permissible testimony from gang experts with respect to the required showing under Penal Code section 186.22 that a crime was committed for the benefit of, at the direction of, or in association with a criminal street gang and may also provide guidance as to the type and extent of evidence, in addition to an expert's testimony, necessary to establish a crime is sufficiently gang-related to support a criminal street gang enhancement. Nonetheless, until and unless the Supreme Court issues an opinion providing differently, we are constrained by *Gardeley* and its progeny approving of the admissibility of such opinion testimony.

are sufficiently beyond the common experience that the opinion would assist the trier of fact. This includes providing testimony about gang membership, dress, hand signals, graffiti, territory, and retaliatory practices. (*Gardeley, supra*, 14 Cal.4th at p. 617; *People v. Valdez* (1997) 58 Cal.App.4th 494, 506.) Indeed, an expert may testify about whether a defendant acted for the benefit of a gang, even though the question is an ultimate factual issue in the case, when these matters are beyond the jury's common experience. (*Valdez, supra*, 58 Cal.App.4th at pp. 507-509.)

Here, Tran is not challenging the evidence that demonstrated that in the past he was a member of the OLB gang. However, he asserts that there was insufficient evidence to show that he was an active OLB gang member when these crimes occurred, or that he was motivated to retaliate against Lim or Nguyen on behalf of fellow gang members. At most, Tran argues that his actions on November 22 were motivated by personal animosity toward the victims, not by a desire to benefit the gang. He points out that although Lorn yelled a challenge to the NERDs and shouted "Get them. Get them," Tran remained silent and did not show any gang signs or indicate his affiliations with the gang. He also argues that there was insufficient evidence that the OLB gang had rivalry with the NERD tagging crew or would be motivated to harm them. Finally, relying on Ninth Circuit case law, *Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1099, Tran argues that there was insufficient evidence for the jury to conclude that Tran had shot at Lim and Nguyen to facilitate any *other* criminal activity.

None of Tran's arguments as to the sufficiency of the gang evidence has merit. First, the prosecution presented sufficient evidence of Tran's gang membership at the time of the shooting. In September of 2006, only two months prior to the crimes, Tran encountered Lim and Nguyen in OLB gang territory of Alpine Park and identified himself as a member of OLB. Officers found a letter dated only a month before the shooting, which Tran wrote to Kong, in which he commiserated with Kong about his conviction and deportation and expressed a desire for revenge against those who testified against him. Tran had gang paraphernalia in his room. When Tran shot at Lim and Nguyen he was accompanied by Lorn—another OLB gang member. According to the

gang expert, a former gang member would not continue to associate with active members. This evidence taken together supports the inference Tran was an active member of OLB on November 22, 2006.

In addition, the evidence was also sufficient to prove that the shooting was committed for the benefit of the OLB gang. All of the circumstances of the prior interactions between Tran, other OLB gang members and the victims of this case suggest that this crime was motivated by more than a personal disagreement. The evidence presented supports the conclusion that the shooting was motivated both by a desire to retaliate and to dominate a rival group who frequented the same areas as the OLB gang. Moreover, the gang expert testified that gangs will retaliate against witnesses who testify against the gang's members and that such retaliation serves the gang's greater aims of establishing their dominance in an area and intimidating the community. Here Lim and Nguyen had testified against OLB member Kong. The prosecution presented evidence an OLB gang member committing crimes against NERD members would also serve the OLB goals of defeating a rival group. Though NERD was only a tagging crew, the rivalry between these groups was demonstrated by evidence that NERD graffiti had been defaced and that OLB graffiti was nearby. The shooting occurred near Alpine Park in OLB's area. Lorn also verbally challenged the NERD tagging crew shortly before the shooting. Such actions are typical of those taken by gang members to benefit the gang and to intimidate any potential witnesses. Even were we to assume that the first interaction between OLB gang members and Lim and Nguyen represented personal conflict, unrelated to the gang, by the time these shootings occurred the situation changed to a violent confrontation with emphasis on "respecting the gang, its members and territories." (*People v. Medina* (2009) 46 Cal.4th 913, 925-927 [discussing the importance of respect to a gang and how disrespecting a gang can lead to a violent confrontation that can escalate to a gang-related offense]; see also *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1367, 1383.)

We are also not persuaded by Tran's reliance on *Garcia* to support his contention that the prosecution had the burden to show that the defendant had the specific intent to

further or promote future criminal activities. As the court stated in *People v. Hill* (2006) 142 Cal.App.4th 770,774, and we agree, the Ninth Circuit Court in *Garcia* misinterpreted California law. The words of Penal Code section 186.22 clearly state the defendant is required to have the specific intent to further or promote *any* criminal activity not *other* criminal activity. (Pen. Code, § 186.22 subd. (b)(1).) Therefore, the prosecution did not have the burden to establish appellant's specific intent to further or promote future criminal activities.

In view of all of the evidence, we conclude the jury reasonably could have concluded appellant committed the crimes with the specific intent "to promote, further, or assist in . . . criminal conduct by gang members." (Pen. Code, § 186.22, subd. (b)(1).) Consequently, the gang enhancements and the jury's true finding on the enhancements were supported by sufficient evidence.

IV. Cumulative Error

Tran contends while the errors he asserts are individually sufficient to warrant reversal, taken together they violate appellant's state and federal constitutional rights to due process and a fair trial. We disagree. As discussed elsewhere here, neither of these claims individually warrants reversal. Thus his claim of cumulative error necessarily fails as well. (*People v. Avila* (2006) 38 Cal.4th 491, 608.)

V. Pre-Sentence Conduct Credits

At sentencing the trial court awarded each appellant 696 days of credit for their pre-sentence days in custody. The court denied them, however, any conduct credits believing they were not entitled to any because of the charges of which they were convicted.

Penal Code section 4019 provides for the granting of credits for work and good behavior. (*People v. Philpot* (2004) 122 Cal.App.4th 893, 907.) Absent contrary authority, "a defendant receives what are commonly known as conduct credits toward his term of imprisonment for good behavior and willingness to work during time served prior to commencement of sentence. [Citations.]" (*People v. Thomas* (1999) 21 Cal.4th 1122, 1125 (*Thomas*).)

Thomas held that pre-sentence conduct credits pursuant to Penal Code section 4019 are properly awarded where the current convictions are not “violent” within the meaning of Penal Code section 667.5, subdivision (c), and defendant is not subject to solely an indeterminate sentence. Otherwise, “[Penal Code] sections 2933.1 and 667.5(c) . . . limit a defendant’s presentence conduct credit to a maximum of 15 percent . . . when the defendant’s current conviction is itself punishable by life imprisonment” (*Thomas, supra*, 21 Cal.4th at p. 1130.)

In accordance with the above-cited authority, appellants contend and the Attorney General agrees, that they were entitled to receive 15 percent of their custody credits under Penal Code section 2933.1. Appellants are correct. The convictions for attempted murder qualify as felonies within the meaning of section 667.5, subdivision (c) and thus they are entitled to pre-sentence conduct credits subject to the maximum 15 percent limitation described in Penal Code section 2933.1. (See *Thomas, supra*, 21 Cal.4th at p. 1131; *People v. Philpot, supra*, 122 Cal.App.4th at p. 908.) Appellants were awarded 696 actual days of credit and therefore they are each entitled to receive 104 days of pre-sentence conduct credits.

DISPOSITION

The superior court is directed to correct the abstracts of judgment for each appellant to show that each appellant is entitled to 104 days of pre-sentence conduct credits in addition to the 696 days of actual in custody credit each was granted. The superior court is to forward corrected copies of each abstract to the Department of Corrections and Rehabilitation. The judgment, as modified, is affirmed.

WOODS, Acting P. J.

We concur:

ZELON, J.

JACKSON, J.